PUBLIC PROSECUTOR

v.

MOHD. NOOH BIN YUSOF & 2 ORS.

HIGH COURT, TAIPING
DATO' HAJI ABDUL MALIK BIN HAJI ISHAK JC
[CRIMINAL TRIAL NO. 58-6-92]
2 JULY 1993

SENTENCE: Dangerous Drugs Act 1052 - Section 39A(2) - Accused pleaded guilty to amended charge.

In this case, the 1st and 3rd accused pleaded guilty to the amended charge under a. 39A(2) of the Dangerous Drugs Act 1952 (Act 234). The Court having satisfied itself that both the accused persons understood the nature and consequences of their plea, forthwith recorded their plea of guilt and convicted them accordingly. The 1st accused was sentenced to 6 years' imprisonment with effect from the date of his arrest and ordered to receive 10 strdkes of the rattan. He was also ordered to undergo his term of imprisonment at Kajang prisons. The 3rd accused was sentenced 6 years' imprisonment with effect from the date of his arrest and ordered to receive 10 strokes of the rattan. He was ordered to undergo his term of imprisonment at Alor Setar prison.

Held:

[1] The Court gave a one-third discount or credit for their plea of guilty following the Supreme Court's decision in *Mohamed Abdullah Ang Swee Keng v. DPP* [1988] 1 MLJ 167 SC

[2] The maximum punishment should be reserved for the worst possible example of the offence under s. 39A(2) of the Dangerous Drugs Act 1952 (Act 234). However, the facts in the present case is not an example of the "worst possible example" for an offence under s. 39(2) of the said Act.

[3] The first accused was sentenced to 6 years imprisonment with effect from the date of his arrest and ordered to receive 10 strokes of the rattan. He was also ordered to undergo his term of imprisonment at Kajang prisons. The third accused was sentenced to 6 years' imprisonment with effect from the date of his arrest and ordered to receive 10 strokes of the rattan. He was ordereq to undergo his term of imprisonment at Alor Setar prisons.

[Orders accordingly].

Cases referred to:
*Saw Soo Kim v. PP [1975] 2 MLJ 134 (**refd**)*
*Kenneth John Ball [1951] 35 Cr. App. R164 (**refd**)*
*Mohd. Jusoh bin Abdullah v. PP [1947] 13 MLJ 131 (**refd**)*
*Nordin bin Kaman & Ors. v. Public Prosecutor [1983] 1 CLJ 313 (**refd**)*
*Public Prosecutor v. Loo Choon Fatt [1976] 2 MLJ 256 (**refd**)*
*Reg v. Curran [1973] 57 Cr. App. R 946 (**refd**)*
*Raja Izzuddin Shah v. Public Prosecutor [1979] 1 MLJ 270 (**refd**)*
*Mohamed Abdullah Ang Swee Kang v. PP [1987] 1 CLJ 405/[1988] 1 MLJ 167 SC (**foll**)*
*Public Prosecutor v. Leong Ying Ming [1993] 2 CLJ 143/[1993] 1 AMR 11, p. 399 (**refd**)*
*Long bin Samat & Ors. v. Public Prosecutor [1974] 2 MLJ 152 FC (**refd**)*
*Johnson Tan Han Seng v. Public Prosecutor [1977] 2 MLJ 66 FC (**refd**)*

Legislation referred to:
Dangerous Drugs Act 1952, s. 39A(2)

Other sources referred to:
The English Sentencing System by Cross, 3rd Edn., p. 141
(1975) Grim. L.R. 468 and (1976) Grim. L.R. 266

For the public prosecutor - Hashim Hamzah, DPP
For the first Accused - K. Kumarendran; M/s. Kumar Sitham & Co.
For the second Accused - Gurbachan Singh; M/s. Bachan & Kartar
For the third Accused - L. A. Gomes; M/s. LA. Gomes & Co.

JUDGMENT

Haji Abdul Malik bin Haji Ishak JC:
The three accused were jointly charged on an amended charge as follows:

> Bahawa kamu dituduh bersama-sama pada 17 Pebruari 1990 jam lebih kurang pukul 10.00 malam di rumah No. 52, Lorong 3, Taman Sri Larut, Simpang di dalam Daerah Larut dan Matang di dalam Negeri Perak Darul Ridzuan dengan niat bersama kamu bertiga, telah memiliki dadah berbahaya ia itu 1430 kartus ganja seberat 353.82 gram dan oleh itu kamu telah melakukan suatu kesalahan dibawah s. 6Akta Dadah Berbahaya 1952 Akta 234 dan boleh dihukum di bawah s. 39A(2) Akta yang sama dibaca bersama s. 34 Kanun Kesiksaan.

The first and the third accused pleaded guilty to the amended charge on 2 July 1993. The Court took pains to ensure that the amended charge was read and explained to them individually. They individually elected to plead guilty to the reduced charge and understood the nature and consequences of their plea.

The typewritten facts (exhibit (PI)) were read individually to the first and the third accused persons and the Court then asked each of them whether they understood the facts and whether they agreed to it. They were again asked whether they still maintained their plea of guilt. The Court having satisfied itself that they understood the nature and consequences of their plea, forthwith recorded their plea of guilt and convicted them accordingly.

The first accused was sentenced to 6 years' imprisonment with effect from the date of his arrest (17 February 1990) and ordered to receive 10 strokes of the rattan. He was also ordered to undergo his term of imprisonment at Kajang Prisons.

The third accused was sentenced to 6 years' imprisonment with effect from the date of his arrest (17 February 1990) and ordered to receive 10 strokes of the rattan. He was ordered to undergo his term of imprisonment at Alor Setar Prisons.

The learned Deputy Public Prosecutor withdrew the amended charge against second accused and the Court accordingly acquitted and discharged him forthwith.

Briefly, the facts as extracted from the typewritten facts (exhibit (PI)), would show that at the time of the raid on house No. 52, Lorong 3, Taman Sri Larut, Simpang, Taiping, only the wife of the first accused was present. She allowed the police to search the interior portion of the house whereupon the incriminating drugs were found in the kitchen portion, tucked in the drain, which was covered with a piece of plank. The police then waited for the return of her husband - the first accused.

At about 12.00 midnight, all the three accused persons returned home and they were placed under arrest. Investigations revealed that the house was occupied by the first accused and his wife together with the third accused.

Counsel for each of the accused then made their plea in mitigation.

First Accused

The first accused was said to be 33 years old, married about a year ago. His wife, who was arrested with him then, was in her late stage of

pregnancy and while in custody, she gave birth to a baby boy. Urged the Court to take note that he has pleaded guilty at the first available opportunity, a very strong mitigating factor. A great deal of time and expense had been saved from an otherwise long and ardous trial. Reminded the Court, as an analogy, that even a plea of guilty of a hardened criminal must be treated as a mitigating factor. The case of *Saw Soo Kim v. PP* [1975] 2 MLJ 134 was referred to. Counsel pointed out that the first accused pleaded guilty as his wife was not charged, even though she was found alone in the said house, at the material time. The non-charging of the wife by the prosecution motivated the first accused to plead guilty to the amended charge. His wife is currently selling nasi lemak. She has, so submitted Counsel, suffered tremendously. Urged the Court to impose a short custodial sentence to enable him to return to his wife and son as soon as possible. Requested the Court to order him to serve his sentence at Kajang Prisons.

Third Accused:

The third accused, a bachelor was said to be 25 years old at the date of the commission of the offence. He came from a broken home. Both his parents were divorced and they had since remarried. It was pointed out that the third accused at the time of his arrest had a steady job selling burger and had to support two brothers and three younger sisters. The Court was told that the third accused was a first offender with no previous conviction. Urged the Court to impose the sentence to run from the date of his arrest and to impose the minimum strokes of rattan. Urged the Court to order him to serve his sentence at Alor Setar Prisons.

The learned Deputy Public Prosecutor urged the Court to impose a deterrent sentence commensurate with their crime. The question of public interest was raised. It was said that the offences were not only self destructive but it would also affect the members of the public.

In passing sentence, I have taken into consideration a long list of factors, namely:

(1) the question of public interest (*Kenneth John Ball* (1951) 35 Cr. App. R 164);
(2) the age of the offender, his wealth, his character and background, the nature of the offence, the circumstances and the manner in which the offence is committed (Mohd. Jusoh bin Abdullah v. PP [W47] 13 MLJ 131 and *Nordin binKaman & Ors. v. Public Prosecutor* [1983] 1 CLJ 313);
(3) the need to strike a balance between the interests of the public and the interests of the offender (*Public Prosecutor v. Lao Choon Fatt* [1976] 2 MLJ 256);
(4) the question of deterrence to the offender andto would be offenders (see. *Reg v. Curran* [1973] 57 Cr. App. R 945 where MacKenna J. said: "As a general rule it is undesirable that a first sentence of immediate imprisonment should be very long, disproportionate to the gravity of the offence, and imposed ... for reasons of general deterrence, that is as a warning to others. The length of a first sentence is more reasonably determined by considerations of individual deterrence)";
(5) society's abhorrence to this type of offence;
(6) the rampancy of the offence;
(7) the plea in mitigation (*Raja Izzuddin Shah v. Public Prosecutor* [1979] 1 MLJ 270);
(8) when a convicted man is sent to prison, he is branded with a social stigma which he carries for the rest of his life;
(9) the English warning in a passage found in The English Sentencing System" by Cross 3rd Edn., at p. 141 to the following effect:

> Prolonged and repeated imprisonment is destructive of family relationships and, by encouraging the prisoner's identification with the attitudes of the prison community, increases his alienation from normal society. In addition, long-term institutionalisation is all too likely to destroy a prisoner's capacity for individual responsibility and to increase the problems he must face when he returns to society.

(10)had the case proceeded for trial under the amended charge, it would take at least two weeks to complete it, thus by pleading guilty to the amended charge a great deal of time and expense had been saved. The full trial would cost the general public much expense as 18 witnesses were involved.

Last, but by no means least, I also gave a one-third discount or credit for their plea of guilt, following the Supreme Court's decision in *Mohamed Abdullah Ang Swee Kang v. PP* [1988] 1 MLJ 167 SC.

It must be borne in mind that the accused persons had pleaded guilty to an amended charge under s. 39A(2) of the Dangerous Drugs Act (1952) Act 234 ("Act") which carries the following punishment:

> ... shall be punished with imprisonment for life or for a term which shall not be less than five years, and he shall also be punished with whipping of not less than ten strokes.

The words "....be punished with imprisonment for life or for a term which shall not be less than five years ..." were said to be "clear and unequivocal and mean that the offence is punishable with imprisonment for more than five years, that is, five years and one day up to a maximum of imprisonment for life" (see *Public Prosecutor v. Leong Ying Ming* [1993] 1 AMR 11 page 399 especially at p. 404). This means that a sentence of five years and one day imprisonment would legallybe in order and would squarely fall within the ambit of the words as reproduced above. Further, the words "... shall also be punished with whipping of not less than ten strokes" reflect the intention of the legislature that the minimum mandatory ten strokes of the rattan should be imposed. It is not out of place to say that the sentence should rightly reflect the exercise of moderation, keeping in mind a sense of proportion. And what would be a moderate and proportionate sentence would be dependent on the facts of each case. In the present case, at the time of the police raid on the house in question, only the wife of the first accused was present. Yet she was not charged. She was released. This factor should be taken into account in assessing the type of sentence suitable for both the accused notwithstanding that the public prosecutor has exercised his discretion not to charge the wife of the first accused. The wide powers of discretion given to the public prosecutor over the control and direction of all criminal proceedings in Malaysia have been fully ventilated in *Long bin Samat & Ors. v. Public Prosecutor* [1974] 2 MLJ 152 FC and *Johnson Tan Han Seng v. Public Prosecutor* [1977] 2 MLJ 66 FC. I need not dwell on it. But, surely the Court is entitled to take into consideration for sentencing, the non-charging of the wife of the first accused. I am aware that the maximum punishment should be reserved for the worst possible example of the offence under s. 39A(2) of the Act (see the articles by famous authors in (1975) Grim. L.R. 468 and (1976) Crim.L.R. 266). But the facts in the present case is not an example of the "worst possible example" for an offence under s. 39A (2) of the Act.

Order accordingly.